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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner*,

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART M. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

George Jones, Jr., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 19, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra, page 18. The judgment of the Court of Appeals is printed in Appendix A hereto, infra, page 35. The Journal Entry of Judgment is printed in Appendix A hereto, infra, page 36. The dissenting opinion of the Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra, page 30.

Jurisdiction

The judgment of the Court of Appeals was entered on May 19, 1969, (infra, Appendix A, page 36). The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether a complaint alleging termination of a state university faculty member solely because of his exercise of first amendment rights in freedom of speech and association states a claim entitling him to relief under 42 U.S.C. § 1983 (the Civil Rights Act of 1871).

Statutes Involved

Amendment I of the Constitution of the United States: "*Freedom of religion, speech, and the press;* Right of assembly and petition.— Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV of the Constitution of the United States provides so far as is here relevant:

"*Guarantee of protection of all citizens.* — No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C.A., Section 1983:

"*Civil action for deprivation of rights.* — Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress."

42 U.S.C.A., Section 1984:

"*Same; review of proceedings.* All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other cases in said court."

42 U.S.C.A., Section 1985 provides, so far as here relevant:

> "*Obstructing justice;* . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws. . . .
>
> "*Depriving persons of rights or privileges* . . . In any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his personal property, or deprived of having and exercising any right or privilege of a citizen of the United States, a party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C.A., 1986 provides, so far as is relevant:

> "*Same; action for neglect to prevent.* Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by

reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...."

Statement Of The Case

Petitioner filed a Complaint, June 1, 1966, against the Respondents pursuant to the Federal Civil Rights Act.*

The Complaint averred that on February 25, 1966, the President and members of the Board of Trustees of Southern Colorado State College in Pueblo, Colorado, terminated Petitioner's services as an Associate Professor of Philosophy (3, 11).*

Petitioner had been appointed as Associate Professor on March 26, 1964, at an annual salary of $8,500.00 (4, 12) His contract was renewed after the first year, but not renewed after the second year:

"For the sole reason that he exercised his privilege as a United States citizen to speak and write his views on matters of public concern and interest, pursuant to the First and Fourteenth Amendments to the United States Constitution, and the Defendants conspired and agreed to deny the Plaintiff, and actually denied him the right and privilege to so speak and write. Although Plaintiff's termination was not a breach of contract, it was a termination of an expectancy of continued employment which is an

*42 U.S.C. § 1983, 1986 and 1988.

*References in this form are to the Transcript of the Record before the Court of Appeals, nine copies of which are lodged herewith.

injury to an interest which the law will protect against invasion by acts violating 42 U.S.C.A. § 1983, 1985, 1986, and 1988. The Defendants unlawfully terminated Plaintiff's employment because of the speaking and writing and holding religious views in the following instances:...'' (4)

The Complaint details four instances: (1) Petitioner having objected to the disqualification of an applicant for his department because the applicant was an oriental; (2) Petitioner's having attacked an English department textbook in the student newspaper as containing a ''pseudo-philosophy''; (3) Petitioner having founded an independent faculty-student publication which contained articles criticizing the war in Viet Nam, commenting on labor problems, pacifism, and containing an article by Petitioner objecting to monitored classrooms; (4) Petitioner having defended a student who had been committed by Court Order for hospitalization as a result of his attempt to register as a conscientious objector. (4-8) Petitioner averred he was a member of the Religious Society of Friends, and a Christian pacifist, and that his speaking and publishing views on pacifism was an exercise of his right to religious beliefs pursuant to the First Amendment of the Constitution of the United States. He averred that:

> ''Solely because of the aforementioned words, beliefs, statements and utterances, and similar words, beliefs, statements and utterances, of the Plaintiff, protected by the First Amendment of the Constitution of the United States, the Defendants terminated his contract as Associate Professor at said college, thereby carrying out reprisal against the Plaintiff for the exercise of his constitutional privileges, and violating his right to due process of law, freedom of speech and belief,

and of privileges and immunities of the United States citizenship." (8)

He averred that as a result of the termination of his employment, he suffered mental anguish, loss of income, diminution of his earning capacity, and was held up to great public scorn. (9)

In His Second Claim for Relief, he charged violation of 42 U.S.C.A. § 1985(2), in that the Defendants conspired to deprive him of equal protection of the laws and the exercise of his rights and privileges under the Constitution and laws of the United States. He demanded judgment against the Defendants for $150,000.00 actual, and $150,000.00 punitive damages. (9-10)

The Defendants filed a Motion to Dismiss (22), stating that:

> "Plaintiff has no federally protected constitutional rights to the renewal of his contract of employment. As a corallary thereto, Defendants have the right to refuse to renew an employment contract for any reason, where there were no rights of tenure as in the instant case.'

On November 28, 1966, the United States District Court for the District of Colorado, entered a judgment of dismissal. (59) In passing on the sufficiency of the complaint, the District Court accepted as true all facts pleaded, including the allegation that the sole reason for the failure of the Defendants to renew the Petitioners contract of employment were statements and actions of the Plaintiff protected by the First Amendment of the United States Constiution. (56) The Court held that:

"It was a matter wholly within the discretion of the Defendants whether Plaintiff's contract would be renewed or allowed to terminate. The fact that the Defendants' decision not to renew the contract was motivated by Plaintiff's statements as set forth in the Complaint is immaterial." (56)

On May 19, 1969, the Court of Appeals, en banc, affirmed the lower court, two judges dissenting. (A. 36*)

Reasons For Granting This Writ

I. *A Board of Trustees of a state college, no matter how broad its statutory authority and discretion, may not terminate a professor for constitutionally improper motives.*

The decision below held:

(1) "Government employment, in the absence of legislation, can be revoked at the will of the appointing officer." (A. 25)

(2) This principle is subject, "to the restriction that unreasonable conditions may not be imposed upon the granting of public employment." (A. 25)

(3) A professor, under Colorado law, "is not an officer, but an employee under contract to fill a chair of learning."[1] (A. 26)

(4) "An employer enjoys an absolute power of dis-

*References in this form are to pages in Appendix A.

[1]The dissent comments: "As a practical matter, this again hardly fits the relationship between Trustees or Regents of a college or university and the professors or the lesser teachers at such an institution. See **Shelton v. Tucker**, 364 U.S. 479"

missing his employees, with or without cause." (A. 26)

(5) Although Petitioner complained that Respondents failed to renew his contract, as a professor, solely because of his exercise of First Amendment rights, "one has no constitutional right to a 'remedy' against the lawful conduct of another." (A. 26)

The dissent correctly summarizes the majority's decision:

"The majority thus holds that under this Colorado statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the Board has unlimited power to discharge teachers." (A. 30)

Therefore, under the theory of the majority opinion, the institution could refuse to hire a teacher solely on the basis of race, religion,[2] or for any other constitutionally improper motive.

The majority sidesteps *Pickering v. Board of Education,* (1968) 391 U.S. 563, 568, and *Keyishian v. Board of Regents,* (1967), 385 U.S. 589, 605, which affirm that unreasonable conditions may not be imposed upon the granting of public employment, by reducing Petitioner to a mere employee, over whom his employer enjoys an absolute power of dismissal, with or without cause. This Court has long conferred a high order of constitutional priority to academic freedom. Justice Frankfurter, in his concurring opinion in *Wieman v. Updegraff* (1952), 344 U.S. 183, 195 noted that:

---

[2]Petitioner averred he was a member of the Religious Society of Friends, and that his speech and actions were an exercise of his right to religious beliefs. (8)

"In view of the nature of the teachers relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes the caution and timidity in their associations by potential teachers."

And Chief Justice Warren, in *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 250-51 said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."

Justice Franfurter added:

"These pages need not be burdened with proof, based upon the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile

and so indispensable for fruitful academic labor." 354 U.S. 262 (concurring opinion)

To the extent that the majority below may be read to suggest that the Board had an unlimited discretion to discharge Plaintiff,[3] it means that teachers may constitutionally be compelled to relinquish First Amendment rights as a condition of employment. As was said in *Pickering v. Board of Education* (1967) 391 U.S. 563, 568:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court. (citations omitted) '(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'"

This Court went on to hold that:

> "A teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U.S. 574

The decision below clearly conflicts with *Johnson v. Branch*, (4 Cir. 1966) 364 F. 2d 177 which holds valid a complaint under the Civil Rights Act that a school committee refused to renew the plaintiff's teaching contract to penalize her for exercising constitutional rights. The

[3] This is the way the dissent read the majority opinion. (A. 31)

lower court had upheld the validity of the complaint, in *Johnson v. Branch* (D.C. N.C. 1965) 242 F. Supp. 721, and at 731 said:

> "The complaint . . . insists that a conspiracy has been perpetrated by defendants in order to punish plaintiff for her acts whereby she exercised rights guaranteed her by the Federal Constitution and Acts of Congress. It is well recognized that the discretion of the defendants, in effectuating their hiring policies, does not extend to an arbitrary denial of those protected rights, while the denial is made under color of state law."

In *Alston v. School Board of City of Norfolk* (4 Cir., 1940) 112 F. 2d 992, cert. denied, 311 U.S. 693, the Court said:

> "It is no answer . . . to say that hiring of any teacher is a matter resting in the discretion of the school authorities. Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination. . ."

And in *Johnson v. Branch,* supra, at 364 F. 2d 180, the Court said:

> "However wide the discretion of School Boards, it cannot be exercised so as to arbitrarily deprive persons of their constitutional rights."

The Tenth Circuit is also squarely in conflict with *Bomar v. Keyes* (2 Cir. 1947) 162 F. 2d 136, although it attempted to distinguish that case. *Bomar* held a probationary teacher, who had not secured permanent tenure, could not be dismissed for exercising a constitutionally

protected privilege. The plurality below writes that *Bomar* referred to an interference "with the interest stemming from the contract existing between Bomar and the Board of Education." (A. 23) *Bomar* specifically said, however:

> "The wrong is independent of any breach of contract, and would be the same, if Keyes had induced the Board not to employ the Plaintiff; indeed, we assume that her discharge by the Board was not a breach of contract at all."

In *Rackley v. School District* (D.C. S.C. 1966) 258 F.Supp. 676, a complaint under the Civil Rights Act was upheld where the Plaintiff alleged her contract was not renewed because of her participation in civil rights demonstrations. There, the statute law of South Carolina conferred absolute discretion in the hiring and discharging of teachers. The Court said:

> "There is no right of tenure provided for public school teachers under the South Carolina law. Surely the Board of Trustees under our law are given discretionary power within the area of reason to discharge a teacher for cause when legally justifiable grounds exist, and to determine whether to continue such employment beyond the year in which a teacher has a contract." (258 F. Supp. 683)

The Court went on to say, at 258 F. Supp. 684, that teachers may not be deprived of personal liberties secured by the Constitution, and the discretion exercised by School Boards must be within reasonable limits so as not to curtail freedom of political expression or any other constitutionally protected right. The Court ultimately found the facts supported the Plaintiff's complaint.

Nor can the majority below be reconciled with the rule of the Seventh Circuit that even if teachers did not have tenure "the Civil Rights Actof 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights." *McLaughlin v. Tilendis* (7 Cir. 1968) 398 F. 2d 287, 289.

Also in conflict with the majority is the holding of *Henry v. Coahoma County Board of Education* (5 Cir. 1965) 353 F. 2d 648 where it was agreed that a school board could not refuse to employ an applicant teacher because of her activities in the N.A.A.C.P.

Throughout the federal court system, the decision below is a glaring atavism. See, *Smith v. Board of Education* (8 Cir. 1966) 365 F. 2d 770; *Jensen v. Olson* (8 Cir. 1965) 353 F. 2d 825; *Brooks v. School District of Moberly* (8 Cir. 1959) 267 F. 2d 733; *Williams v. Sumter School District* (D.C. S.C. 1966) 255 F. Supp. 397; *Albaum v. Carey* (D.C. E.D. N.Y. 1968) 283 F. Supp. 3; *Carraway v. Jefferson Parish School Board* (D.C. La. 1966) 251 F. Supp, 462; *Hopkins v. Wasson* (D.C. Tenn. 1962) 227 F. Supp. 278; Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

Should any ambiguity in the opinion below seem a ruling that Petitioner's activities, listed in the Complaint (4-8), were not by their nature constitutionally protected, it is worthwhile to briefly consider the issue. The listed activities were well within the scope of protected criticism worked out by this Court from *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, to *Pickering v. Board of*

Education,[4] supra. See, also, *Meehan v. Macy* (D.C. Cir. 1968) 392 F. 2d 822[5]; *Murray v. Vaughn* (1969) 38 U.S. L. Week 2018[6]; *In re Tepedino* (N.Y. Ct. App. 1969) 37 U.S. L. Week 2707.[7]

II. *An expectancy of continued employment by a teacher is a sufficient interest to be protected by the Civil Rights Act.*

We have previously shown that even where a teacher seeks initial employment by a School Board, he may not be denied such employment for constitutionally improper motives. However, in the instant case, Petitioner did not allege he was a mere applicant for employment, but further alleged his contract of the previous year had not been renewed, and that he had an expectancy of continued employment. He cited *Bomar v. Keyes* (2 Cir. 1947) 162 F. 2d 136, which upheld a complaint under the Civil Rights Act by a probationary teacher who was dismissed for absences while serving on a federal jury. It was there held:

> "The wrong is independent of any breach of contract... Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege."

[4]A teacher's public criticism of the School Board, although partly based on false statements, was entitled to protection.

[5]A Canal Zone employee discharged for a defamatory lampoon of the Governor was entitled to a review of his discharge, in the light of **Pickering.**

[6]The First Amendment prohibits the government's discharge of a Peace Corps worker for publicly criticizing the government's Vietnam and Peace Corps policy.

[7]Criticisms by social investigators of the New York City Welfare Department's practices are protected.

The School Board had asserted in *Bomar*, that Plaintiff, "had not secured permanent tenure. Having been duly dismissed by the Board of Education during her probationary period, such dismissal is not subject to review."

The Second Circuit reasoned that since service on a federal jury is protected by the Civil Rights Act:

> "It would emasculate the Act either to deny protection against reprisal to those whom threats did not deter, or to leave without recourse those who were made victims of reprisals of which they had not been warned."

As the dissent below points out, the Plaintiff could very well prove an expectancy of continued employment to exist outside any specific contractual or statutory provision, and the majority could not very well base its opinion on the proposition that there was no "expectancy".

Conclusion

As the dissent renders clear, the decision below was aberrant from the teachings of the Court in *Pickering v. Board of Education* (1968) 391 U.S. 563, and from the prevailing views of other Courts of Appeal and District Courts. Petitioner prays that Certiorari be granted, and, if this Court considers it proper, that, without setting this case for argument before this Court, the Court summarily reverse the judgment of the Court of Appeals and remand to the United States District Court for the District of

Colorado, for the filing of responsive pleadings by the Respondents.

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — 1969

GEORGE JONES, JR., Appellant,

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART W. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(District Court No. 66-C-290 Civil)

Eugene Deikman, Denver, Colorado, (Harry K. Nier, Jr., Denver, Colorado, with him on brief) for appellant.

Richard W. Laugesen, Jr., Special Assistant Attorney General, Denver, Colorado, (Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, James W. Creamer, Jr., Ass't Attorney General, Denver, Colorado, with him on brief) for appellees.

Before MURRAH, Chief Judge, LEWIS, BREITENSTEIN, HILL, SETH, HICKEY and HOLLOWAY, Circuit Judges.

PER CURIAM

This appeal is from a judgment dismissing with prejudice the complaint of appellant Jones, an associate professor of philosophy. The basis of the dismissal was that the complaint failed to state a claim upon which relief could be granted. Appellees, who are the President and members of the Board of Trustees of Southern Colorado State College, filed the motion to dismiss upon which the judgment is based.

The dismissal of the complaint, drawn as a civil rights pleading, presents the issue of whether a claim is stated under the Civil Rights Act.[1]

The complaint alleges jurisdictional facts,[2] identity of parties, their residence and citizenship, and the status of the college.

The complaint alleges the powers of the Board of Trustees are as follows:

> "The Board of Trustees is vested by [§§ 124-17-1 and 124-5-1 Colo. Rev. Stats. (1963)] with the entire control and management of the affairs of the College, has general supervision of said College and the control and direction of the funds and appropriations made thereto, with power to appoint and remove all sub-

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[1] 42 U.S.C. §§ 1983, 1985, 1986 and 1988.

[2] Jurisdiction of the court is invoked under 28 U.S.C. §§ 1331 and 1343, as well as under 42 U.S.C. §§ 1983, 1986 and 1988 of the Civil Rights Act.

ordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, about, or concerning said College, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates, and to fix the salaries of each and prescribe their several duties. They further have the power and authority to prescribe the various books and texts to be used in the Colleges, the courses of study and instruction and to make all needful rules, regulations and By Laws for the good government and management of the same. The actions of President Hopper, hereinafter described, were approved, authorized and ratified by said Board of Trustees, and each of them."

It is further alleged the acts complained of are exercised under color of the statutes, regulations, customs and usages vesting the power above averred.

The complaint further alleges that Jones was given notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board which is attached to the complaint as Exhibit A.[3]

---

[3]Exhibit A: "February 25, 1966 Dr. George Jones, Jr., 1401 Greenwood Pueblo, Colorado 81003.
Dear Dr. Jones:

I regret to inform you that at the end of this academic year, your services with Southern Colorado State College will be terminated. "So that there will be no misunderstanding, I wish to point out that this decision was arrived at before the publicity surrounding the John Dean case. Prior to the John Dean case, the Chairman of the Division and the Dean College and I agreed upon this decision. The Chirman of the Executive Committee of the College from the Trustees of State Colleges in Colorado was likewise informed at that time.

"I trust and hope that you will find future employment which will be satisfying to you. Yours truly,

/s/ J. V. Hopper, President."

The complaint then continues with a partial description of the "John Dean case", referred to in the above exhibit.

The *curriculum vitae* of appellant Jones is set forth in the complaint as well as the details of his association and status with Southern Colorado State College. In this description of his status with the college, Jones points out that the duration of each appointment under which he served was one year and that it was at the end of his second appointment that the appellees determined he would not be reappointed.

The allegations then conclude that the reason Jones was not reappointed was because he had exercised his constitutionally protected rights[4] in the following manner:

(a) He objected to the disqualification of an applicant for his department because the applicant was an Oriental.

(b) He attacked an English department textbook in a student newspaper.

(c) He founded and independent faculty-student publication which contained articles criticizing the war in Viet Nam, commenting on labor problems and pacifism, and an article objecting to monitored classrooms.

(d) He supported the student, John Dean, referred to above in Exhibit A, who had been committed to a hospital pursuant to a court order obtained by his parents as a result of the student's attempt to register with his draft board as a conscientious objector.

---

[4]Under the First and Fourteenth Amendments to the United States Constitution.

Jones averred he was a pacifist by religious conviction and that his views expressed orally and by writing on this subject were an exercise of his religious freedom.

He concluded that because of the above conduct and actions an expectancy of continued employment was terminated which was an injury to an interest which the law will protect against invasion by acts in violation of the Civil Rights Act.[5]

Jones alleges he was damaged as a result of the failure to renew his teaching contract, and relief is prayed for in the amount of $300,000.00.

The second claim of Jones' complaint by reference adopts the foregoing allegations describing them as a conspiracy to punish him for exercising his constitutional rights granted by the First and Fourteenth Amendments. He further concludes he was denied equal protection under the law.

The basic requirements of a complaint based upon 42 U.S.C. § 1983 are: (1) that the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws.[6] The allegations necessary to state such a claim, as in the case of any other civil action in the federal courts, are not to be held insufficient unless it appears beyond doubt that the plaintiff can prove no set

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[5]42 U.S.C. §§ 1983, 1985, 1986 and 1988.

[6]Flemming v. Adams, 377 F.2d 975 (10th Cir.) **cert. denied**, 389 U.S. 898 (1967); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

of facts in support of his claim which would entitle him to relief.[7]

When we examine the complaint herein in the light of the foregoing rules, we are directed to ask: What guaranteed right, privilege or immunity was denied Jones which is protected under the Constitution and laws?

The complaint alleges the refusal of the appellees to reappoint Jones after the term of his current appointment expired.

Jones contends the appellees, authorized by the Colorado statutes to administer the college, have denied him a right of expectancy to continued employment because he exercised freely his constitutional rights of speech, publication and religion. Jones cites only Bomar v. Keyes as authority recognizing this expectancy interest.

Bomar, supra, related to a high school instructor who relied upon a probationary contract of employment which was terminated in October during the academic year. The court assumed that Bomar's discharge was not a breach of contract,[9] but identified her interest in the following language: "Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect

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[7]Conley v. Gibson, 355 U.S. 41 (1957); Keenan v. Looney, 227 F.2d 878 (10th Cir. 1955).

[8]162 F.2d 136 (2d Cir.) **cert. denied**, 332 U.S. 825 (1947), **rehearing denied**, 332 U.S. 845 (1948).

[9]"By [the] word [privilege] we understand a freedom to assert a legal right or a legal power. . . . The [state] statute provides that 'the educational affairs of each city shall be under the general management and control of a board of education.' . . . we assume that her discharge by the Board was not a breach of contract at all." Bomar v. Keyes, 162 F.2d at 139.

against invasion by acts themselves unlawful, such as the denial of a federal privilege.'"[10] The federal privilege involved was jury service.

Analyzing this language, we direct ourselves to the question: What is the source of the interest? In seeking the answer we must take the facts into account.

The contract which established the interest attributed to Bomar was a probationary contract of employment between Bomar and the Board of Education. Keyes was not privy to the contract; therefore, the court could assume that Bomar's discharge was not a breach of contract. Keyes, however, by complaining to the Board, had interferred with the interest stemming from the contract existing between Bomar and the Board of Education. This analysis is sustained by the Restatement of Torts § 766 (1939)[11] which is cited as authority in *Bomar*.

The source of the interest in *Bomar* is the contract. The actions sounds in tort against one not privileged to interfere with the contract.

The complaint in our case makes no allegation or inference that a contract existed. Jones' complaint expressly concedes that his "termination was not a breach of contract," thereby inferring that a contract did not exist. Accordingly, the interest which Jones seeks to assert cannot be derived from a contract.

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[10]Id.

[11]"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."

We now look to the Federal Constitution and laws for the source of the interest secured.

The Supreme Court has consistently held, "the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.... This principle was reaffirmed quite recently in Vitarelli v. Seaton, 359 U.S. 535."[12] The foregoing must be read in the light of the principle enunciated in Pickering v. Board of Education,[13] which quotes Keyishian v. Board of Regents.[14] The principle stated teaches that public employment may be denied altogether subject, however, to the restriction that unreasonable conditions may not be imposed upon the granting of public employment.[15] There is nothing in the complaint to warrant an inference or conclusion that the Colorado statute nor its application herein went "beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[16]

As a matter of fact, there are no allegations relating to conditions of employment of professors or assistant professors at southern Colorado State College. The complaint merely alleges the duties and authority of the administrators. Therefore, we can find no where in the complaint an allegation of any identified interest which is secured by the Federal Constitution of laws.

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[12]Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886, 896-897 (1961).

[13]391 U.S. 563, 568 (1968).

[14]385 U.S. 589, 605 (1967).

[15]Shelton v. Tucker, 364 U.S. 479 (1960).

[16]Id. at 490.

The complaint alleges a Colorado institution involved, governed by the laws of Colorado identified in the pleading. Appellant was a professor at this institution of learning. "It is clear that a professor is not an officer, but an employe' under contract to fill a chair of learning.[17]

The complaint alleges Jones was appointed for an academic year and then reappointed and served the entire second appointment. He was notified he would not be reappointed for a third academic year. The alleged interest deprived was in the appointment for a third year. It is admitted he did not have a tenure privilege either by Colorado law or contract. "Among the most fundamental rules of the law of master and servant is that which recognizes that, absent an applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause."[18]

Southern Colorado State College is a state academic institution organized and existing under Colorado law which vests the government and management of its affairs in a board of trustees which has among other vestitures "power to appoint and remove all subordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, or about, or concerning said college, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates...." (recited in complaint as set forth, supra).

We think this provision precludes Jones from having

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[17]State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372, 373 (1904). **See also** 75 A.L.R. 1352 (1955). "The courts are almost unanimous in holding that the position of a teacher is that of an employee, resting on the contract of employment, and not that of public officer."

[18]51 A.L.R. 2d 745, § 2 (1960).

the relief he seeks in this proceeding. His claimed interest must find its source in his expired appointment which constituted whatever contract existed. The provision above acknowledged became a part of any contract that may have existed between him and the college.

The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest.[19] "One has no constitutional right to a remedy' against the lawful conduct of another."[20]

As demonstrated above the right, privilege or immunity Jones alleges he was deprived of is non-existent.

We believe the appellees herein were exercising a discretion given them by the power vested under the Colorado statutes set forth in the complaint. The exercise of this discretion cannot, under the facts alleged in the complaint, become unlawful conduct which would justify its falling within the ambit of the Civil Rights Act.

"Because of the special needs of the university, both public and private, great discretion must be given it in decisions about the renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competence."[21]

> " 'Will the interests of an institution of learning be promoted by dispensing with the services of a particular professor?' And yet if we assume that the statute

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[19]**See** Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir. 1969); Cobb v. Howard University, 106 F.2d 860 (D.C. Cir.) **cert. denied**, 308 U.S. 611 (1939).

[20]Senn v. Tile Layers Protective Union, 301 U.S. 468, 483 (1937).

[21]Developments in the Law — Academic Freedom, 81 Harv. L. Rev. 1045, 1101 (1968).

> of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist.'"[22]

> "It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.'"[23]

The second claim re-alleges the various acts complained of in the first claim and describes the charge in the nature of a conspiracy to deprive Jones of claimed

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[22]Ward v. Board of Regents, 138 F. 372, 377 (8th Cir. 1905).

[23]Greene v. Howard University, 271 F. Supp. 609, 615 (D.D.C. 1967).

rights under the Civil Rights Act and the Constitution of the United States. The complaint alleges 42 U.S.C. §§ 1983, 1986 and 1988 in its jurisdictional allegations and 42 U.S.C. § 1985 (2) and (3) in its second claim. Combining them we examine what has been alleged in the complaint as a conspiracy on the part of appellees to deprive Jones of the rights claimed.

If one does not rely on the provisions of 42 U.S.C. § 1985 (3), relating to going in disguise, the existence of a conspiracy is an essential allegation in the complaint based upon the substantive law of the state.[24]

The complaint is based upon an act established by the Colorado statutes authorizing the exercise of discretion by the appellees. We concluded above there was not an unlawful or a wrongful exercise of the discretion claimed under the facts alleged.

Colorado has stated the rule, "[A]n action for conspiracy can not be successfully maintained unless the purpose to be effected is unlawful or a lawful purpose is accomplished by an unlawful means."[25]

This court has recognized the similar Utah rule regarding whether or not the action complained of is justified.[26]

The trial court concluded that under the Colorado Statutes the exercise of discretion was authorized and justified. We agree and affirm.

AFFIRMED.

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[24]Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

[25]Contract Main. Co. v. Local No. 105, Bldg. Serv. Emp. Internat'l Union, 160 Colo. 190, 415 P.2d 855, 856 (1966).

[26]Bank of Utah v. Comm'l Sec. Bank, 369 F.2d 19, 28 (10th Cir. 1966), **cert. denied**, 386 U.S. 1018 (1967).

SETH, Circuit Judge, with whom HOLLOWAY, Circuit Judge, joins, Dissenting:

This case comes to us on the dismissal of plaintiff's complaint for failure to state a claim. The majority has held that the complaint is legally insufficient because the plaintiff has asserted no "right" or "interest" to be protected by the Constitution. I must disagree because in my opinion the allegations are sufficient under the decisions of the Supreme Court for the case to be brought to trial.

The complaint describes plaintiff's two contracts of employment each for a year and asserts an expectancy of continued employment thereafter. He further alleges that he received a notice of termination. This letter advised him in part: "I regret to inform you that at the end of this academic year, your services with Southern Colorado State College will be terminated." There was no reference to any contract, but his services were terminated at the expiration date of his contract then in force. The plaintiff alleges that his services were so terminated solely because of his exercise of First Amendment rights.

The majority bases its opinion on the proposition that there was no "expectancy" of further employment, and thus the plaintiff had no "interest" to be protected by the First Amendment to entitle him to relief. The majority finds no "expectancy" by referring to the statutory powers of the trustees of the school to hire and fire (Colo. Rev. Stat. 1963, §§ 124-17 and 124-51), and states that:

> "The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest," (citing Cobb v. Howard University, 106 F. 2d 860 (D.C. Cir.)).

The majority then holds that there is no "interest," therefore no cause of action was alleged. The majority thus holds that under this Colorado Statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the board has unlimited power to discharge teachers. It holds that "beyond doubt" plaintiff could not prove otherwise. This is in error on two grounds; the first is that plaintiff could very well prove an "expectancy" of continued employment to exist outside any specific contractual or statutory provision, if this be necessary, and secondly, the board's power to discharge cannot be unlimited as the holding of the majority assumes.

To consider first the power to discharge, it appears that college professors may be "employees," as the majority says, as contrasted to "public officers"; but nevertheless they have many additional and unique perquisites, privileges, rights and concurrent burdens, obligations, and ethical standards which have been added, assumed, and accepted over a long period of time as part of their professorial positions. To categorize them as "employees" is not helpful nor is it really descriptive because it is incomplete. The majority then quotes from authorities to say that the fundamental rule of the master-servant relationship is that ". . . an employer enjoys an absolute power of dismissing his employee, with or without cause." As a practical matter, this again hardly fits the relationship between trustees or regents of a college or university and the professors or the lesser teachers at such an institution. See Shelton v. Tucker, 364 U.S. 479. The position of teachers relative to various supervisory boards has been the subject of many recent court decisions, and it would serve no purpose to develop the point here. These cases include Pickering v. Board of Education, 391 U.S. 563;

Keyishian v. Board of Regents, 385 U.S. 589; Weiman v. Updegraff, 344 U.S. 183; American Federation of State, County & Municipal Employees v. Woodward, 406 F. 2d 137 (8th Cir.); McLaughlin v. Tilendis, 398 F. 2d 287 (7th Cir.); Smith v. Board of Education of Morrilton School District No. 32, 365 F. 2d 770 (8th Cir.); Johnson v. Branch, 364 F. 2d 177 (4th Cir.]. Under this prevailing case law, I cannot agree that the Board here concerned had an unlimited discretion to discharge plaintiff. To include within the Board's discretion by statute, practice, or employment status the right to discharge for the exercise of First Amendment rights is certainly to attach unreasonable conditions to plaintiff's employment.

The Board certainly has broad discretion over the teaching staff and administrators, and is charged with the duty of operating the school in an orderly, effective, and professional manner. They can discipline and discharge those whose actions and words unduly interfere with teaching programs or with the teaching by others on the staff or otherwise seriously disrupt the operation of the school. (See the "... performance of daily duties in the classroom," in Pickering v. Board of Education, supra). But no matter how broad their discretion may be by statute or by custom it cannot be used to deprive teachers of their constitutional rights. This is what plaintiff has alleged, and this is sufficient. Whether he can prove it is indeed another matter, and a matter which has not yet been reached in this case.

The balancing referred to in Pickering v. Board of Education is done when the facts are in and not before. The Court there said:

"The problem in any case is to arrive at a balance

> between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

We cannot anticipate such a balancing of facts on this motion.

The exercise of constitutional rights cannot create for a teacher or be used as some sort of a protection or insulation against discharge for proper and adequate reasons, nor can it be under Pickering without limit any more than can the exercise of discretion by the Board. As to the position of the majority that plaintiff could not prove as a fact and beyond doubt an "expectancy" of continued employment, it must be observed that consideration is given in the opinion only to possible contractual and statutory provisions. The expectancy, if one is required, could very well arise from other sources or be based on school rules, practice, or custom as observed above. The plaintiff has alleged as a fact that there was such an expectancy. This is probably a mixed fact and law assertion, but we must assume on this appeal that the fact elements are capable of proof unless there is some legal bar. The majority says that the statutory powers of the trustees are such a bar, and also says that nothing arises by contract or statute.

The power bar has been considered above, but it is intertwined with the tenure or expectancy matter, and is mentioned again. But what is this "interest" or "expectancy" requirement? It would appear that a tenure requirement as a basis for asserting a cause of action has been long abandoned. McLaughlin v. Tilendis, 398 F.2d

287 (7th Cir.); Johnson v. Branch, 364 F. 2d 177 (4th Cir.). Teachers of whatever status do not give up First Amendment rights by reason of their employment. Pickering expressly so holds. Non-tenure teachers cannot be held to have more limited constitutional rights than do others. They are on a temporary basis not for reasons related to the problems before us, but instead on the quality of their teaching. Tenure is not the status which gives rise to the right to be protected. Tenure as a requirement for standing or to assert a cause of action has disappeared. The "expectancy" requirement of the majority does not seem greatly different from tenure. Some "interest" in continued employment or "expectancy" is an essential ingredient of both. This "expectancy" is perhaps a tenuous sort of tenure, but it is nevertheless such a requirement, and in my opinion can no longer be made.

I would thus hold that the complaint is sufficient as measured by the standards in the recent decisions of the Supreme Court, and the case should come on for trial.

MAY TERM, MAY 19th, 1969.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable John J. Hickey and Honorable William J. Holloway, Jr., Circuit Judges.

George Jones, Jr., Appellant,

9248 vs.

Jesse Victor Hopper, President of Southern Colorado State College, and C. Gale Sellens, William H. Southard, Robert W. Bartley, L. Richard Bratton, Phillip M. Lorton, Stuart W. McLaughlin, and Mrs. William B. Naugle, Members of the Board of Trustees of Southern Colorado State College, Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court be and is hereby affirmed.

Honorable Oliver Seth and Honorable William J. Holloway, Jr., Circuit Judges, dissented.

WILLIAM L. WITTAKER, Clerk,
By GLADYS E. HOBBS, Deputy Clerk.

[Seal]

Appeal from the United States District Court
for the District of Colorado.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9248

George Jones, Jr., Appellant,

vs.

Jesse Victor Hopper, President of Southern Colorado State College, and C. Gale Sellens, William H. Southard, Robert W. Bartley, L. Richard Bratton, Phillip M. Lorton, Stuart W. McLaughlin, and Mrs. William B. Naugle, Members of the Board of Trustees of Southern Colorado State College, *Appellees.*

No. below: 66-C290 Civil

Judge: Chilson

Notice of appeal: December 20, 1966

Action commenced: June 1, 1966

10/22/68	Motion for determination of appeal—Orig. and 3 cc.—Cert. of Service
1/24/69	Supplemental memorandum of Appellees—Orig. and 25 xerox copies Cert. of Service.
1/27/69	Appellant's Supplemental Memorandum—Orig. and 7 cc.—Cert. of Service
12/18/68	Cause set for rehearing en banc January 1969 session

1/20/69	Argued and submitted on rehearing, en banc Appellee to file supplemental memorandum in 5 days
5/19/69	Opinion: Per Curiam, En Banc—Judgment: Affirmed—Dissent: Seth and Holloway
6/24/69	Mandate
7/ 2/69	Original record on appeal returned to Clerk (1 volume) Receipt original record